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Supreme Court of the United States

1075

ROBERT VERRAND,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

- X

ROBERT VIGGIANO, :

Petitioner, :

vs. :

UNITED STATES OF AMERICA, :

Respondent. :

- X

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, ROBERT VIGGIANO, petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered November 18, 1970 (Docket No. 33212).

The judgment affirmed the conviction for possession of stolen goods (18 U.S.C. 659) after a jury trial in the Eastern District of New York 68 CR 454).

Opinion Below

The opinion of the Court of Appeals, not yet reported, is set forth as Appendix A.

Jurisdiction

The jurisdiction of this Court to review the judgment of the Court of Appeals is granted pursuant to 18 U.S.C. 1254 (1).

Issue Presented

Did the Court of Appeals err, contrary to the constitutional standards of Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969), in upholding the issuance of a search warrant, where the hearsay information was furnished by a previously unreliable informant, and the FBI's own investigation in no way included an observation, or any knowledge of the defendant, or the premises, or the particular contraband involved?

Constitutional Provision Involved

The Fourth Amendment to the United States Constitution, prohibiting unreasonable search and seizure, is well known to members of this Court.

Preliminary Statement

Petitioner, ROBERT VIGGIANO, was convicted of one count of possession of stolen goods (18 U.S.C. 659). He was acquitted of conspiracy to so possess (18 U.S.C. 371). The remaining seven co-defendants, including his brother OLAN, were acquitted of both charges.

On appeal only the issue of the validity of the search and seizure, pursuant to a Commissioner's warrant, of brother OLAN's home, was raised

and considered. The search netted six cartons of stolen Russ Togs apparel, which was the corpus of the government's case.

The affidavit of FBI Agent PAUL STAPLETON was based very substantially on information given that very same day, October 24, 1968, by ALLAN MAGID, a person previously unknown to law enforcement officials. In the words of the Court of Appeals' Opinion — "a walk-in, with whom the FBI had had no experience before he came to the Bureau Office on October 24, 1968" (A2).

The opinion of the Court of Appeals, in summarizing MAGID's information to the FBI, which Agent STAPLETON inserted in his affidavit, states:

At page 369:

> "...in August, 1968, Robert Viggiano told Magid that he had just purchased a load of Russ Togs clothing which he wanted to resell for $17,000; that a month later one Vic Orena gave Magid a key to the garage at 245-02 South Conduit Boulevard, Queens, with the instructions to show the merchandise to prospective buyers; that Magid entered the garage October 22, 1968 and saw a quantity of boxes bearing Russ Togs labels, some of which bore out-of-state addresses, and a quantity of ladies' and children's wearing apparel, having Russ Togs labels; and that Magid had given Agent Stapelton the key to the South Conduit Boulevard garage.
>
> "They further stated that in early Oc-

> tober, 1968, Robert Viggiano told Magid he had received another Russ Togs load, and Viggiano showed Magid a quantity of boxes bearing Russ Togs labels with out-of-state addresses; that on October 7, 1968 Robert Viggiano told Magid that he had moved 'the load' to a storage room on the ground floor of his brother's home 'around the corner,' and that Magid knew that Allen Viggiano, Robert's brother, lived 'around the corner' at 9031 Farragut Road; that Robert Viggiano informed Magid on October 20, 1968 that the merchandise was still at the Farragut Road address and that Magid would be told when the shipment was moved elsewhere, but that Magid had not been so informed before reporting to the F.B.I."

At page 370:

The opinion of the Court of Appeals, in summarizing what the FBI knew on its own, which Agent Stapelton also inserted in his affidavit, states:

> "They also disclosed that by its own inquiries, the F.B.I. learned that a truck containing $36,000 worth of Russ Togs apparel consigned to out-of-state purchasers had been hi-jacked in Manhattan on August 20, 1968, that a motor carrier's depot had been burglarized September 30, 1968 and that a quantity of Russ Togs apparel, labelled for interstate shipment, had been stolen."

* * *

At pp. 370-372:

In upholding the search warrant against a defense contention that the Commissioner was not justified in concluding that the informer was credible and his information reliable, the Court of Appeals wrote:

> "... The detailed information reported by Magid, most of which was based upon his personal observation together with admissions made directly to him by the appellant, his own admissions as aider and abettor, his possession of the key to the garage, which he turned over to the F.B.I. and the corroboration of the outside information picked up by the F.B.I., such as the facts and dates of the hi-jacking and theft of the garments, the brand name of the items, the addresses to out-of-state consignees, the relative consistency of price (all things considered) between the manufacturer's invoices and appellant's purchasing and asking prices, all afford the kind and quality of evidentiary material that support and confirm the Commissioner's conclusion that the informant was generally trustworthy."

* * *

> "The affidavits also sufficiently report the 'underlying circumstances' which 'enable the magistrate independently to judge the validity of the informant's conclusion...' that the appellant was engaged in criminal activity. * * * The affidavits stated that Magid personally observed boxes of Russ

> Togs merchandise at both the South Conduit Boulevard address and in Robert Viggiano's garage. Although the affiant did not represent that Magid had seen the cartons at the Farragut Road address, he did allege that Robert Viggiano told Magid that the goods stored in his garage had been moved to the Farragut Road premises and that Magid would be informed if they were again moved. A man of reasonable caution could infer from these allegations that Magid had been accurately informed concerning the location of the stolen goods in order that he might facilitate the sale of those goods. The warrant applications plainly showed that Magid was relying 'on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." Spinelli v. United States, supra at 416.

Reasons for Granting the Writ

The opinion of the Court of Appeals, in finding both credibility and reliability in the hearsay information furnished by the informed OLAN MAGID, is violative of the standards of this Court promulgated in Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 419 (1969).

It is not disputed that MAGID was not previously reliable; he had never before given the FBI information, nor was he ever known to them. See Wong Sun v. United States, 371 U.S. 471, 480 (1963).[1]

1. The narcotic agents have no basis in experience for confidence in the reliability of Hom Way's information; he had never before given information.

Neither did the FBI ever observe any of the cartons, or any of the defendants, or the inside of any of the premises.

Except for MAGID's tip, the FBI had no information connecting Viggiano to the cartons, which had been alleged to have been stolen from Russ Tog. The FBI's independent knowledge of a prior theft in no way connected it to Viggino or his co-defendant, or to Viggiano's premises or that of his brother.

We are not dealing with hearsay information furnished by a previously reliable informer, or from a police officer, or even from an ordinary citizen. Nor are we dealing with hearsay information furnished by an informer who saw the defendant commit the crime of hi-jacking, or one who sold the stolen cartons to the defendant.

All we have is a hearsay statement from a not previously reliable source, that Viggiano exhibited cartons to Magid, and sought his assistance in disposing of the cartons.

The FBI's own investigation, which merely noted the fact of a Russ Tog theft some time in the past, in no way corroborates Magid's story implicating Viggiano with the fruit of that theft. The FBI had no independent knowledge of who was involved in the theft — in fact, Magid's story in no way involved Viggiano in the theft. Quite to the contrary — Magid's story was that Viggiano had told him he had purchased the cartons (A3). The FBI never attempted to corroborate Magid's statement, nor did they ever attempt to view the cartons (even though Magid claimed to have a key

to the premises), or the inside of the premises, or the defendants.

The FBI's own information was too limited to give assurance to the informant's reliability, and in no way corroborates the informant's representations, as required by Aguilar and Spinelli.

To date, this Court has never found probable cause based upon a statement from a not previously reliable informer, where the law enforcement officer did not himself observe either the defendant in question, or the contraband, or the premises. In our case, the Court of Appeals has relaxed the constitutional standards to a degree which does not afford reliability and trustworthiness. It is for this Court to resolve the issue now posed — can probable cause be found in a situation where the informer is not previously reliable, and the FBI agents have never observed the defendant, or the premises, or the contraband, and have no independent knowledge as to the defendants, or the premises, or the particular contraband.

The Court of Appeals credits the hearsay information of Magid because Magid's own statement of his conversations with Viggiano involve "his own admissions as aider and abettor" (A5). In this regard, the Court of Appeals relies on the concurring opinion of Mr. Justice White in Spinelli, 393 U.S. at 425. But Justice White concurred alone, and none of his colleagues joined him in attaching any significance to an informant's statement which may be an admission of his own complicity.[2] It is in order for this Court to look

2. In Wong Sun v. United States, 371 U.S. 471, 490 (1963), this Court agreed that probable cause was lacking for Wong Sun's arrest, even though co-defendant Toy, by his own statement which was an admission, implicated Wong Sun.

again at the issue, now that the Court of Appeals has chosen to utilize that factor in assessing probable cause.

Conclusion

The situation is indeed novel where probable cause was found from a hearsay statement of a not previously reliable informer, where law enforcement officials neither observed the contraband, or the defendant, or the premises, nor had any independent knowledge involving the defendant, or the premises or these particular cartons.

The writ of certiorari should be granted to determine whether the constitutional standards can be so drastically relaxed — especially so when Spinelli recently tightened the standards.

Respectfully submitted,

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Appendix "A"
Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 193—September Term, 1970.

(Argued October 7, 1970 Decided November 10, 1970.)

Docket No. 35212

UNITED STATES OF AMERICA,

Appellee,

—v.—

ROBERT VIRGIANO,

Defendant-Appellant.

Before:

MOORE, SMITH and ANDERSON,

Circuit Judges.

Appeal from a judgment of conviction in the United States District Court for the Eastern District of New York, Jack B. Weinstein, *Judge*, on a charge of possession of stolen goods in violation of Title 18 U.S.C. §659. Affirmed.

JEROME LEWIS, Esq., New York, N. Y., *for Appellant.*

JAMES O. DRUKER, Special Att'y, Department of Justice (Edward R. Neaher, U. S. Attorney, Eastern District of New York, and Denis E. Dillon, Special Att'y, Department of Justice, on the brief), *for Appellee.*

Opinion

Anderson, *Circuit Judge*:

The appellant Robert Viggiano was convicted on a single charge of possession of stolen goods in violation of Title 18 U.S.C. §659 and was sentenced to five years imprisonment. At the trial the Government presented evidence which was the product of a search and seizure authorized by two search warrants issued by a United States Commissioner. The accused challenged the validity of the warrants on the ground that the supporting affidavits on which the Commissioner relied were insufficient to show probable cause. A motion to suppress was made in advance of trial; the court held a hearing on the motion and denied it. The defendant now appeals from the judgment of conviction because the trial court refused to exclude the evidence seized. We affirm.

The search warrants were based upon the affidavits of F.B.I. Special Agent Paul Stapleton and were issued on October 24, 1968. They authorized the F.B.I. agents to search the ground floor of a dwelling located on Farragut Road and occupied by Allen Viggiano, appellant's brother, and the garage attached to the premises at 245-02 South Conduit Boulevard, Queens. The agents executed the warrants the following day and seized six cartons of Russ Togs brand wearing apparel at the Farragut Road residence.

The F.B.I. learned of the stolen goods and their whereabouts through one Allen Magid, a "walk-in," with whom the F.B.I. had had no experience before he came to the Bureau offices on October 24, 1968. After interviewing Magid, the F.B.I. agents made a quick investigation of their own and Agent Stapleton prepared affidavits summarizing Magid's report and the results of the F.B.I.

inquiries. In substance the affidavits[1] gave the Commissioner the information that: in August, 1968 Robert Viggiano told Magid that he had just purchased a load of Russ Togs clothing which he wanted to resell for $17,000; that a month later one Vic Ocean gave Magid a key to the garage at 245-02 South Conduit Boulevard, Queens, with instructions to show the merchandise to prospective buyers; that Magid entered the garage October 22, 1968 and saw a quantity of boxes, bearing Russ Togs labels, some of which bore out-of-state addresses, and a quantity of ladies' and children's wearing apparel, having Russ Togs labels; and that Magid had given Agent Stapleton the key to the South Conduit Boulevard garage.[2]

They further stated that in early October, 1968, Robert Viggiano told Magid he had received another Russ Togs load, and Viggiano showed Magid a quantity of boxes bearing Russ Togs labels with out-of-state addresses; that on October 7, 1968 Robert Viggiano told Magid that he had moved "the load" to a storage room on the ground floor of his brother's home "around the corner," and that Magid knew that Allen Viggiano, Robert's brother, lived "around the corner" at 9031 Farragut Road; that Robert Viggiano informed Magid on October 20, 1968 that the merchandise was still at the Farragut Road address and that Magid would be told when the shipment was moved elsewhere, but that Magid had not been so informed before reporting to the F.B.I.

---

1 The district court properly considered the allegations of both affidavits as if submitted in a single application. *United States* v. *Bevaso*, 367 F.2d 347, 348-50 (2 Cir. 1966), *vacated on other grounds*, 390 U.S. 202 (1968).

2 F.B.I. agents did not attempt to use this key to the South Conduit Boulevard garage before applying for the search warrants.

They also disclosed that by its own inquiries, the F.B.I. learned that a truck containing $36,000 worth of Russ Togs apparel consigned to out-of-state purchasers had been hijacked in Manhattan on August 20, 1968; that a motor carrier's depot had been burglarized September 30, 1968 and that a quantity of Russ Togs apparel, labelled for interstate shipment, had been stolen.

Appellant contends the warrants obtained on the basis of these allegations were issued without probable cause. In *Spinelli v. United States*, 393 U.S. 410 (1969), the Supreme Court discussed the constitutional standards to be applied in assessing the sufficiency of a warrant application containing not only an informant's report but also the results of an independent F.B.I. investigation which was said to corroborate at least a part of the informant's representations. The Court in that case reaffirmed the dual requirement of *Aguilar v. Texas*, 378 U.S. 108, 114 (1964), that the warrant application must state "some of the underlying circumstances" from which the informant drew his conclusions concerning the suspect's criminal activities and disclose some of the reasons which gave assurance of the informant's reliability.

In the present case the question is whether or not there was sufficient in the informant's report and the information gained by the F.B.I. in its outside inquiry, both as stated in the affidavits, to justify the Commissioner in deciding that the informant was generally trustworthy and that what the informant knew which led to his making the charge was obtained in a reliable way. *Spinelli v. United States, supra*, at 417.

We conclude that the affidavits were sufficient to justify a finding of probable cause for the issuance of the warrants. The detailed information reported by Magid, most of which

was based upon his personal observation together with admissions made directly to him by the appellant, his own admissions as aider and abettor,[3] his possession of the key to the garage, which he turned over to the F.B.I. and the corroboration of the outside information picked up by the F.B.I., such as the facts and dates of the hijacking and theft of the garments, the brand name of the items, the addresses to out of state consignees, the relative consistency of price (all things considered) between the manufacturer's invoices and appellant's purchasing and asking prices, all afford the kind and quality of evidentiary material that support and confirm the Commissioner's conclusion that the informant was generally trustworthy. See *Jones* v. *United States*, 362 U.S. 257, 269 (1960).

In *United States* v. *Rozza*, 365 F.2d 206 (2 Cir. 1966), for example, the affiant officer investigated the burglary of a New Jersey motor vehicle agency from which validating machines and license forms had been stolen. An informant turned over to the police stolen operators licenses he allegedly purchased from Kuhle. On the basis of this information a search of Kuhle's house was authorized. Rejecting the defendant's contention that the warrant was issued without probable cause, this court stated that "[t]he

---

3 *See Spinelli* v. *United States*, 393 U.S. 410, 425 (1969) (White, J. concurring); *Ourso* v. *Rinfati*, 273 F. Supp. 428, 429 (D. Mass. 1967), *cert. denied*, 391 U.S. 969 (1968).

In *United States* v. *Gilbert*, 366 F.2d 923, 931 (9 Cir. 1966), the court found credible the report of a "fully confessed participant in the crime, mortally wounded and beyond expectation of personal benefit by incriminating the innocent." While Magid was apparently far from being in *extremis*, he does involve himself in his report as a peripheral participant in agreeing to aid and abet in disposing of the stolen goods. While not conclusive on the matter of Magid's trustworthiness, it is something the Commissioner was entitled to consider, because it is more unusual than not that a man would recount his involvement in criminal activity when in fact there was no such criminal activity.

identity of the licenses found on [the informant] with those known [by the affiant] to have been stolen was a far stronger reason for believing [the informant] than a record of an informer's previous reliability." See *United States* v. *Wood*, 270 F. Supp. 963, 967 (S.D.N.Y. 1967).

The affidavits also sufficiently report the "underlying circumstances" which "enable the magistrate independently to judge of the validity of the informant's conclusion . . ." that the appellant was engaged in criminal activity. The above mentioned items of information are relevant also to this portion of the test standard. Particular weight should be given to matters within the informant's own observation and hearing. In *Spinelli* the Supreme Court gave recognition to personal observation as a reliable basis for an informant's report. 393 U.S. at 416. The affidavits stated that Magid personally observed boxes of Russ Togs merchandise at both the South Conduit Boulevard address and in Robert Viggiano's garage. Although the affiant did not represent that Magid had seen the cartons at the Farragut Road address, he did allege that Robert Viggiano told Magid that the goods stored in his garage had been moved to the Farragut Road premises and that Magid would be informed if they were again moved. A man of reasonable caution could infer from these allegations that Magid had been accurately informed concerning the location of the stolen goods in order that he might facilitate the sale of those goods. The warrant applications plainly showed that Magid was relying "on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." *Spinelli* v. *United States*, *supra* at 416.

The judgment of the district court is affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1075

ROBERT VIGGIANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in the Eastern District of New York under 18 U.S.C. 659 and 2 for receiving and possessing goods from an interstate shipment, knowing such goods to have been stolen (App. 8a). He was sentenced to a prison term of five years and fined $5,000. The court of appeals affirmed (Pet. 1a-6a).

The sole issue raised is the sufficiency of the two affidavits for search warrants. The allegations contained in the affidavits (which are summarized in the

opinion below (Pet. App. 3a-4a) show the following: Through its own investigation, the FBI knew that a Max Miller Trucking Company truck, containing $36,000 worth of wearing apparel consigned by Russ Togs, Inc., a New York corporation, to various consignees in states outside New York, had been hijacked in Manhattan on August 20, 1968. In addition, one Magid had given information to the FBI to the effect that in August 1968 petitioner told Magid that he had just purchased a load of Russ Togs clothing for $12,000 which he wanted to resell for $17,000. In early September one Vic Orena told Magid that the load was being moved from "Viggiano's spot" to another location. On September 8, Orena gave Magid a key to a garage at 245-02 South Conduit Boulevard, Queens, New York, with instructions to show the merchandise to prospective buyers. Magid had entered the garage, most recently on October 22, 1968, and had seen a quantity of boxes bearing Russ Togs labels (some of which bore out-of-state addresses), a quantity of ladies' and children's wearing apparel bearing Russ Togs labels, and open Russ Togs boxes. This affidavit stated that Magid had given the agent the garage key.

Another affidavit submitted to the Commissioner at the same time revealed that in early October 1968 petitioner told Magid that he had received another Russ Togs load. Petitioner subsequently showed Magid a quantity of boxes bearing Russ Togs labels with out-of-state addresses in petitioner's own garage at 592 East 92nd Street. On October 7, 1968, petitioner told him that he had moved "the load" to his

brother's house "around the corner." Magid knew that Allen Viggiano, Robert's brother, lived around the corner from petitioner at 9031 Farragut Road in the third story of a two family brick dwelling which had a garage and storage room on the first floor and a tenant's quarters on the second floor. As late as October 29, 1968, petitioner told Magid that the merchandise was still at the Farragut Road address, and that Magid would be told when the shipment was moved elsewhere, but Magid had not been so informed before reporting to the FBI. This affidavit also indicated that the FBI had additional information that the Max Miller Trucking Company had been burglarized during the night of September 30, 1968 and that a quantity of Russ Togs merchandise had been stolen from their shipping depot (App. 12a-22a).

Applying the standards of *Spinelli* v. *United States*, 393 U.S. 410, and *Aguilar* v. *Texas*, 378 U.S. 108, the court below upheld the sufficiency of the affidavits. It founded its decision on the detailed information reported by Magid, which was based upon his personal observations or admissions made to him directly by petitioner; on Magid's own admissions that he was an aider and abettor; Magid's possession and surrender to the FBI of the key to the South Conduit Boulevard garage; and the independent information obtained by the FBI concerning the hijacking and burglary which was consistent with and tended to corroborate Magid's story (Pet. App. 4a-5a).

This ruling was correct. The information supplied by Magid in this case both detailed "the manner in which the information was gathered" and described

"the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor," see *Spinelli*, *supra*, 393 U.S. at 416. The added information of the agents concerning the two stolen shipments of Russ Togs clothing complemented and tended to corroborate the information furnished by Magid. See *Eaton* v. *United States*, 409 F. 2d 1355 (C.A. 5), certiorari denied, 396 U.S. 891. Another consideration, not stressed in the opinion below, is that here the name of the informer was revealed in the affidavit for the search warrant. The commissioner thus had a sound basis for determining that the information before him was not based on rumor.

To the extent that this case involves the use of information supplied by an informant who had not previously furnished information to the police, it is related to *United States* v. *Harris*, No. 30, this Term, certiorari granted February 24, 1970 (397 U.S. 905). Since, however, each search warrant case turns on its own particular facts and in this case the affidavits were clearly sufficient to establish probable cause, there is, in our view, no reason to delay action on this petition pending decision in *Harris*.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1971.

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October Term, 1970

No. 1075

ROBERT VIGGIANO,

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REPLY MEMORANDUM OF PETITIONERS

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APPENDIX

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Reply Memorandum of Petitioner

The petitioner Viggiano submits this memorandum in reply to the answering memorandum of the Solicitor General.

The opinion of the Court of Appeals is now reported at 433 F.2d 716 (CA-2, 1970).

The government memorandum (page 4) does refer to a related issue case, United States v. Harris, No. 30, October 1970 term, certiorari granted, 397 U.S. 905 (2/24/70).

In Harris the Court of Appeals for the Sixth Circuit (412 F.2d 796) held insufficient an affidavit submitted in support of a search warrant, where the affidavit did not recite that the informer was previously reliable, and merely referred to the informer as a "prudent person." The Court of Appeals did not consider it legally significant that the informer stated he personally had purchased illicit whisky for more than two years from the defendant, and as recently as two weeks, and that he knew another person who purchased illicit whisky from the defendant the past two days.

Nor did the Court of Appeals in Harris attach any weight to the affidavit recitation that the defendant had a reputation for dealing in illicit whisky, and that a constable had in the past located a cache of whisky in premises under the defendant's control. As such, the inability of the federal agents to corroborate in a substantial way by personal knowledge or observation, the informer's leads could not overcome

the legal obstacle that the informer was not previously reliable. Nor did the Court of Appeals attach any weight to the admission against interest of the informer that he regularly purchased illicit whisky — that this made him an aidor and abettor.

It was the Solicitor General (not the defendant) who petitioned for certiorari claiming that the principles of Aguilar and Spinelli were not properly applied by the Court of Appeals (Harris Petition, page 4). And it was the Solicitor General who asserted that the Supreme Court should clarify the law to hold that an informer need not be previously reliable, as long as the corroboration is substantial (Harris Petition, pages 4-5).

It is ironic that the Solicitor General, having successfully secured certiorari in Harris as a case worthy of clarification of the legal issue of the use of information supplied by a non-previously reliable informer, should seek to avoid the identical issue in this case (Viggiano) by asserting that no two cases present the identical facts. The legal issue presented is identical — it is immaterial that the peculiar facts of each case are different.

In its certiorari petition in Harris, the Solicitor General, in stressing the importance of the issue, and the need for clarification, stated (pp. 4-5, 8):

> "Here the only issue is whether the affidavit in question sufficiently established the credibility of the informant. In the past the Court has recognized that an inform-

ant's credibility may be established by showing (1) that he has previously given information that proved reliable (see McCray v. Illinois, 386 U.S. 300) or (2) that the information given the informant was corroborated by the investigation of the law enforcement officers involved (see Draper v. United States, 358 U.S. 307). We ask the Court to grant review in this case because it presents the important question whether these are the exclusive means for establishing the credibility of an informant or whether there are other rational criteria which a magistrate may consider in determining whether what the informant said should be credited.

"We believe there are circumstances in which a magistrate should be allowed to issue a warrant on the basis of information supplied by a person who has never before provided information to the police."

* * *

"While the particular offense here involved is not of great significance, the principle at stake is. A lead in solving a very serious crime may come from a person who has not previously given information. Law enforcement officers ought to be able to act on such information, even though the informer is unwilling to reveal his identity, when his information is specific, when he is willing to swear to the truth of his statements, when the officer is willing to swear that he found the informer credible, and

> when the information is consonant with other facts known to the law enforcement officers concerning the subject's reputation and activities."

Again in its brief in Harris, the Solicitor General stated (pp. 13-14):

> "Indeed, it is this aspect of the lower court's opinion which most concerns the government, and which occasioned our request for certiorari in this case. In the past, this Court has recognized that an informant's reliability may be established by showing that he has previously given information that proved reliable. See McCray v. Illinois, 386 U.S. 300. We believe, however, that there are circumstances in which a magistrate should be allowed to issue a warrant on the basis of information supplied by a person who has never before provided information to the police."

As such it hardly seems appropriate for the Solicitor General to suggest that Viggiano does not present a cert-worthy issue. After all both the sovereign and his subjects are bound by the same law.

The opinion of the Second Circuit in this case is contrary to the opinion of the Sixth Circuit in Harris. The issue is substantial — this Court did grant certiorari in Harris. And clarification is in order, for this Court has yet to say that an informer need not be previously reliable.

It is significant to note that the Solicitor Gen-

eral has not attempted to dispute the basic legal thrust of this petition — "to date this Court has never found probably cause based upon a statement from a not previously reliable informer, where the law enforcement officer did not himself observe either the defendant in question, or the contraband, or the premises" (Petiton, p. 8). Nor did the Solicitor General in either its Harris petition or its Harris brief refer to a single case of this Court which would contradict this statement as to the state of the law. In fact in its Harris brief (p. 12), the Solicitor General, in advancing an alternative position, hedged — "But even if we assume that the reliability of the informer test suggested in Aguilar is fully relevant here, . . ." In view of this argument we can hardly say that the law does not require some clarification.

Conclusion

It is requested that the Court set this matter for oral argument along with Harris,[1] or postpone decision on this petition until Harris is decided.

Respectfully submitted,

JEROME LEWIS
Counsel for Petitioner

H. ELLIOT WALES
On the Brief

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1. The respondent's brief in Harris is due January 28th. Apparently, the appeal may be scheduled for oral argument during the session commencing March 22nd.

Form A. O. 93 (Revised Oct. 1939) SEARCH WARRANT Search Warrant

United States District Court

FOR THE

EASTERN DISTRICT OF NEW YORK

Commissioner's Docket No. 16

Case No. 120

UNITED STATES OF AMERICA

v.

The ground floor of a two story brick dwelling located at 9031 Farragut Road, Brooklyn, N.Y.

SEARCH WARRANT

To Special Agents of the Federal Bureau of Investigation

Affidavit having been made before me by Paul Stapleton, Special Agent Federal Bureau of Investigation

that he {has reason to believe / is positive} that {on the person or on the premises known as} on the ground floor of a two story brick dwelling, located on the north side of Farragut Road, between East 92nd Street and Remsen Avenue, and numbered 9031 Farragut Road, New York in the Eastern District of New York

there is now being concealed certain property, namely a quantity of cartons of "Russtogs" Inc., ladies sportswear, slacks, skirts and

which are goods stolen from the Russtogs Inc., of Long Island, New York while moving in interstate commerce, from the depot of the Max Miller Trucking Co., and said goods were stolen on or about September 30, 1968, in violation of Title 18, United StatesCode, Section 659.

[here give alleged grounds for search and seizure]

and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the {person / premises} above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the {person / place} named for the property specified, serving this warrant and making the search {in the daytime / at any time in the day or night} and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 24th day of October, 19 68

Gerard T. McGuire, Special Attorney
Department of Justice
U.S. Courthouse, Brooklyn, N.Y.

U. S. Commissioner

G3-Pm

[Federal Rules of Criminal Procedure provide: "The warrant shall direct that it be served in the daytime, but if the affidavits ... positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." Rule 41(c)]

Search Warrant

RETURN

I received the attached search warrant October 24 , 19 68 , and have executed it as follows:

On October 25 , 19 68 at 10:20 o'clock AM. I searched [the person / the premises] described in the warrant and

I left a copy of the warrant with in garage.
(Name of person searched or owner or "at the place of search")

together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

1-Open carton showing shipment from Russ Togs, Inc., 27-11 49th Ave., Long Island City, New York consigned to B. Forman (Main) 45 Clinton Avenue, South Rochester, N.Y. Label on carton reflected invoice number 99R906, dated 8/16/68, Department 381, account #1022. Carton contained women's sweaters, styles 1999 and 3518.

3-Open cartons showing shipment from Russ Togs, Inc., 27-11 49th Ave., Long Island City, N.Y. consigned to Potomac Merchandise, 12100 Park Lawn Drive, Rockville, Maryland. Marked on cartons in black crayon # 48073. Cartons contained women's nylon stretch pullover blouses and/or sweaters, style 1561 in assorted colors.

1-Open carton showing shipment from Russ Togs, Inc., 27-11 49th Ave., Long Island City, N.Y. Dept. W302 consigned to Gimbels (South Hills) Pittsburgh, Pennsylvania. Marked in black crayon "via Steel City, WT06, 00R522." Carton contained women's slacks, hangtag reflecting lot 4619, 8688, WPL 6250 and women's skirts, hang tags reflecting lot 4632, 8686, WPL6250.

Also found in garage:

3-Women's ski jackets (shell liners) bearing Russ Togs hang tags, style 3312, WPL 6250, lot 4252, 20 women's 3/4 length fingertip car coats

This inventory was made in the presence of

Special Agent Monkman
and

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

[signature]

Subscribed and sworn to and returned before me this 4th day of November , 19 68 .

[signature]
United States Commissioner

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.

★ FEB 10 1969 ★

TIME A.M.
P.M.

Search Warrant

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

the ground floor of a two story brick dwelling located at 9031 Farragut Road, Brooklyn, New York

AFFIDAVIT

T. 18, U.S.C. § 659

EASTERN DISTRICT OF NEW YORK, SS:

Paul Stapleton, being duly sworn, deposes and says that he is a Special Agent of the Federal Bureau of Investigation, duly appointed according to law, and acting as such.

Your deponent has reason to believe that there is being kept and concealed on the ground floor of a two story brick dwelling, located on the north side of Farragut Road, between East 92nd Street and Hensen Avenues, and numbered 9031 Farragut Road, and occupied by Allen Viggiano, his family and another tenant, a quantity of "Russtog" ladies sportswear, slacks, skirts and knitwear, which were stolen, from an interstate shipment of Russtogs merchandise between September 30, 1968 and October 1, 1968, from the Max Miller Trucking Company terminal, at 2214 37th Avenue, Long Island City, New York and which had been received by the said Trucking Company from Russtogs, Incorporated, 27-11 49th Avenue, Long Island City, New York, for shipment to various consignees outside of the State of New York, in violation of Section 659, Title 18, United States Code.

The grounds for your deponent's belief are as follows:

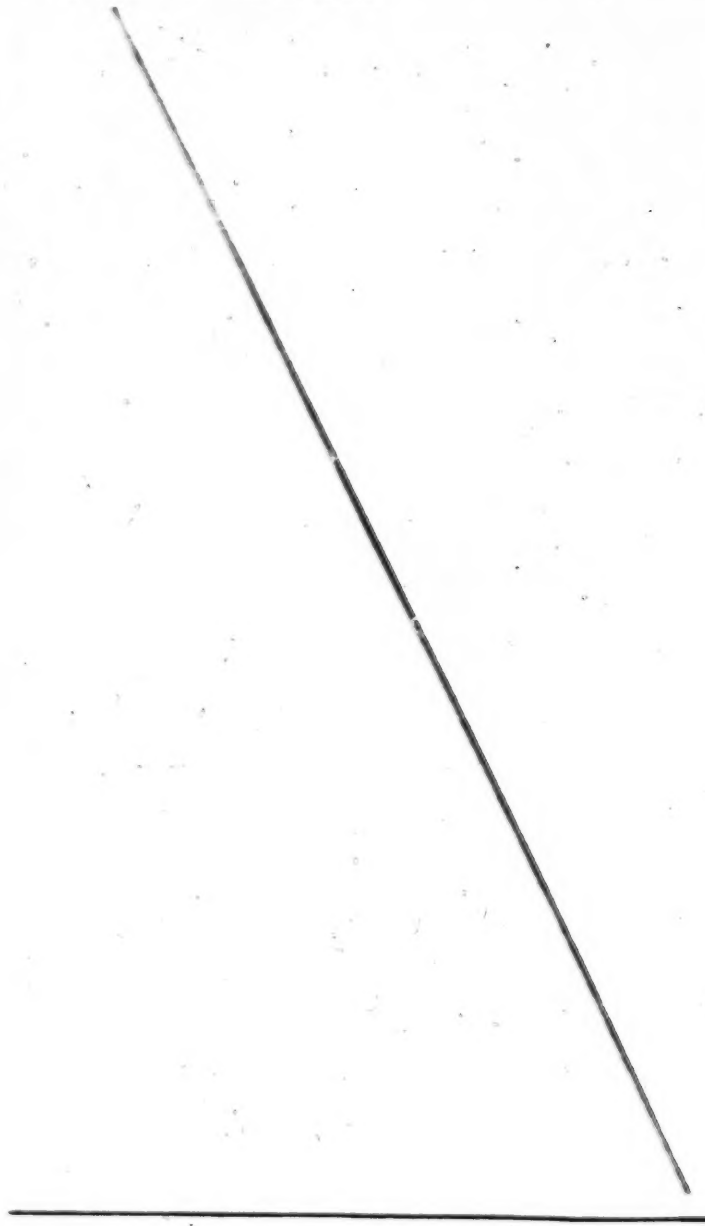
Search Warrant

1. Investigation by agents of the Federal Bureau of Investigation has disclosed that Max Miller Trucking Company reported a burglary of their premise, between the evening of September 30, 1966 and the morning of October 1, 1966, in which a quantity of Russtogs merchandise, valued in excess of One Hundred Dollars ($100.00), and received from Russtogs, incorporated, for shipment to various consignees outside the State of New York, and a quantity of other shippers wearing apparel received for interstate shipment, had been stolen from their shipping depot at 42-14 9th Avenue, Long Island City, New York, within the Eastern District of New York

2. Allen Magid informed me of the following: that he had a conversation with one Robert Viggiano in the early part of October 1966 in which Viggiano told him that he had received "another Russtog Load", that the said Viggiano showed him, in his garage, located at 292 East 92nd Street, a quantity of boxes bearing Russtogs labels and out of state addresses, and said "that's the load." That thereafter, on or about October 7, 1966 the said Robert Viggiano told Magid that he moved "the load" to his brother's house "around the corner." That the said Magid knows one Allen Viggiano, the brother of the said Robert Viggiano, and that Allen Viggiano lives "around the corner" from Robert Viggiano's house, in a two story, two family brick dwelling with a garage on the ground floor, on Farragut Road between East 92nd Street and Remsen Avenue, number 9031 Farragut Road. Further, that Magid was informed by Robert Viggiano that as recently as October 20, 1966 the merchandise was still in Allen Viggiano's house. Further that there is a garage and storage room on the ground floor of Allen Viggiano's house, that there is a tenant living on the first floor and that Allen Viggiano lives on the second floor. Further that Robert

Search Warrant

Viggiano told Magid that "the stuff" was right underneath the tenant. Magid said further that he would be told when the shipment moved from the premises described and he was not been so informed.



6a

Search Warrant

WHEREFORE, your deponent respectfully prays that a Search Warrant issue authorizing your deponent, and other Special Agents of the Federal Bureau of Investigation to enter in the daytime, with the proper assistance, the premises on the ground floor of a two story brick dwelling, located on the north side of Farragut Road, between East 92nd Street and Remsen Avenues, and numbered 9031 Farragut Road, as described above, and there search for and seize all property specified.

Sworn to before me this
24th. day of October 1966

United States Commissioner
Eastern District of New York

A TRUE COPY:

SEARCH WARRANT

United States District Court

FOR THE

EASTERN DISTRICT OF NEW YORK

Commissioner's Docket No. 16
Case No.

UNITED STATES OF AMERICA V. a garage at the premises 43-02 South Conduit Blvd. Queens, New York	SEARCH WARRANT

To: Special Agents of the Federal Bureau of Investigation

Affidavit having been made before me by Paul Stapleton, Special Agent Federal Bureau of Investigation

that he has reason to believe that on the premises known as

in the Eastern District of New York

there is now being concealed certain property, namely a quantity of boxes of ladies and childrens wearing apparel valued at about Thirty Six Thousand Dollars ($36,000.00).

that there are goods stolen from the Bassinger, Incorporated of Long Island, New York, while moving in interstate commerce in a motortruck owned by one Max Miller Trucking Company, and said goods were stolen on or about August 20, 1968 in violation of Title 18, United States Code, Section 659.

and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the premises named for the property specified, serving this warrant and making the search in the daytime — in the nighttime as I find reasonable cause has been established therefor — and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 24th day of October 19 68

Gerard T. McEniry, Special Assistant
Department of Justice
U.S. Courthouse, Brooklyn

[signature]
U.S. Commissioner

Search Warrant

RETURN

I received the attached search warrant October 24, 1968, and have executed it as follows:

On October 25, 1968 at 9:05 o'clock A.M. I searched the person (the premises) named in the warrant and

left a copy of the warrant with at the place of search

together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

1 small piece of cardboard to which is attached a Rusatogs, Inc. label bearing invoice # 68.812, account # 1.078, your order # 3707666.

1 small piece of cardobard bearing partial lettering of Rusatogs.

2 small pieces of cardboard bearing partial labels

1 clear plastic collar holder

1 straight pin

This inventory was made in the presence of Edward P. Doherty, William E. Kelly and Francis E. Dwyer

I swear that this inventory is a true and detailed account of all the property taken by me on the warrant.

Subscribed and sworn to and returned before me this 1st day of November, 1968.

Search Warrant

FILED

FEB 10 1969

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

AFFIDAVIT

T. 18, U.S.C. § 659

a garage at the premises
245-02 South Conduit Blvd.
Queens, New York

EASTERN DISTRICT OF NEW YORK, SS:

Paul Stapleton, being duly sworn deposes and says that he is a Special Agent of the Federal Bureau of Investigation duly appointed and acting as such.

Your deponent has reason to believe that in a certain garage, part of and attached to a two story building, located at the premises of 245-02 So. Conduit Blvd., Queens, N.Y within the Eastern District of New York, there is being kept and concealed a quantity of wearing apparel which was part of the contents of a truck operated by the Max Miller Trucking Company, 2214 37th Avenue, Long Island City, New York, which truck and contents were stolen in an armed robbery, in violation of Title 18, United States Code, Section 659, on August 20, 1968, in the vicinity of West 36th Street, between 10th and 11th Avenues, New York City, New York, and which were part of interstate shipments of the said wearing apparel from Russtogs, Incorporated, 27-11 49th Avenue, Long Island City, New York, to various consignees within and outside of the State of New York.

The grounds for my belief are as follows:

1. Allen Magid informed me of the following:

Search Warrant

first in the latter part of August 1968, Allen Magid had a conversation with one Robert Viggiano concerning a "Mustang load" which the said Viggiano had just "purchased" for Twelve Thousand Dollars ($12,000.00) saying that he wanted to sell it for Seventeen Thousand Dollars ($17,000.00) Further that on or about September 3, 1968, Vic Orena told the said Magid that "the load" was being moved from Viggiano's "spot" to another location. Thereafter, on or about September 20, 1968, Orena gave the said Magid a key to the above described garage where "the load" was stored and told Magid to use the key to show the merchandise to prospective buyers. Thereafter, Magid entered the garage, most recently on October 22, 1968, and saw therein, a quantity of boxes bearing "Mustang" labels, some of which bore out of state addresses, and a quantity of ladies and childrens wearing apparel, having Mustang labels, and opened Mustang boxes.

2. The said Magid has given me the above described key

3. Investigation by Agents of the Federal Bureau of Investigation has revealed that the above described truck and contents were reported, by the Max Wasser Trucking Company to have been stolen on August 20, 1968. The contents of the truck as described in the invoices, were ladies and childrens wearing apparel, consigned from Mustangs, Incorporated, Long Island City, New York, to various consignees in Omaha, Nebraska; Fairmont, West Virginia; Pittsburgh, Pennsylvania, and other points within and outside of the State of New York. The value of the various interstate shipments as stated on the invoices, which I have examined, was approximately Thirty Six Thousand Dollars ($36,000.00).

Search Warrant

WHEREFORE, your deponent respectfully prays that a Search Warrant issue authorizing your deponent, and other Special Agents of the Federal Bureau of Investigation to enter in the daytime, with the proper assistance, the premises of a garage at the premises 249-02 so. Conduit Blvd., Queens, N.Y., as described above, and there search for and seize all property specified.

Sworn to before me this
24th day of October 1968

Paul Stapleton

United States Commissioner
Eastern District of New York

A TRUE COPY:

Stanley Warren

9 & 0m